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### The Legal Protection of Ideas

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## The Legal Protection of Ideas

### Abstract

The received wisdom is that an idea as such is not legally protected. But now courts are embarking on a course which, at least in some respects, embraces the proposition that ideas will sometimes be protected. This essay suggests that these contemporary developments in the common law world should be regarded with disquiet. Courts are sanctioning the commercial exploitation of ideas in the face of an apparent desire of human beings to reduce every aspect of themselves to divisible, saleable commodities. Short term commercial gain is preferred to the timeless importance of ideas in the seamless web of humanity. This essay protests this trend, and looks at other possibilities in terms of social vision, theory, and possible political response.

### Keywords

Intellectual property; Idea (Philosophy)

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# THE LEGAL PROTECTION OF IDEAS<sup>©</sup>

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The received wisdom is that an idea as such is not legally protected. But now courts are embarking on a course which, at least in some respects, embraces the proposition that ideas will sometimes be protected. This essay suggests that these contemporary developments in the common law world should be regarded with disquiet. Courts are sanctioning the commercial exploitation of ideas in the face of an apparent desire of human beings to reduce every aspect of themselves to divisible, saleable commodities. Short term commercial gain is preferred to the timeless importance of ideas in the seamless web of humanity. This essay protests this trend, and looks at other possibilities in terms of social vision, theory, and possible political response.

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## I. INTRODUCTION

[Ideas are more powerful than] practical men ... commonly [understand] ... Soon or late, it is ideas, not vested interests, which are dangerous for good or ill.<sup>1</sup>

The thrust of intellectual property law<sup>2</sup> is today usually expressed in economic terms: the perceived need to enable creators and producers of knowledge-based commodities to capture the full, or at least fuller, benefits of those commodities. In broad terms, there are two models which address this objective in contemporary legal systems. The first, the protective model, creates a series of discrete protective laws which give proprietary protection<sup>3</sup> on closely defined terms. The second, the state support model, gives creators direct support or rewards, in one form or another, but allows relatively free appropriation by producers. Both models endeavour to encourage creation *and* dissemination of intellectual creations. The protective model allows greater rewards and more sophisticated interests to be created.

Common law jurisdictions have historically adopted the protective model. Several problems are apparent with it. First, not everybody accepts an overtly economic rationale; cultural and political objectives are inadequately accommodated. Second, there is a long standing controversy as to whether the model actually

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<sup>1</sup> This passage is adopted from the final passage of Keynes's monumentally influential *General Theory of Employment, Interest and Money* (New York: Harcourt, Brace & World, 1964).

<sup>2</sup> I use intellectual property here in the large sense, as covering patents, copyright, trademarks, industrial designs, and any judicially created cause of action which has the effect of protecting intellectual creations.

<sup>3</sup> To an economist, a property right arises whenever a right has the effect of creating some degree of exclusivity, regardless of the legal form of that right.

achieves its stated economic goals.<sup>4</sup> Third, at least in the eyes of the Third World, it is seen as a significant weapon of repression against members of that unfortunate community. Fourth, the model is increasingly being asked to accommodate more than it was designed for, and probably far more than it can ever satisfactorily accommodate. More and more people are trying to accommodate more and more things under the protective umbrella of intellectual property law to achieve private economic gain.

It is an aspect of this last problem which provokes this essay. A central tenet of our law has been that an idea as such is not legally protected. Hence, the law historically refused to support the legal commodification of ideas. But now the courts appear to be embarking on a course which does, at least in some respects, embrace the proposition that ideas will sometimes be protected. If this is so, it is a critical departure in our law deserving of rigorous attention. The relevant questions are, I think, the following. First, is it correct to say that the historic attitude of common law judges has been that ideas are not protected? Second, if that is so, how far has that broad proposition been modified in recent years? Third, if there has been some change or modification of stance, why has that occurred? Fourth, what values are involved in this development? Fifth, where *should* the law be going in contemporary circumstances? Sixth, what kind of legal strategy is most appropriate to the particular legal objectives identified?

It is as well to declare biases, or at least suspicions, at the outset. It strikes me that many of the central problems with the legal protection of ideas can be illustrated by the whaling problem in Melville's *Moby Dick*.<sup>5</sup> In that extraordinary work, a whale is

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<sup>4</sup> On the debate over copyright, see S. Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs" (1970) 84 Harv. L. Rev. 281. On patents, see R. Merges, "Commercial Success and Patent Standards: Economic Perspectives on Innovation" (1988) 76 Cal. L. Rev. 805; R. Eisenberg, "Patents and the Progress of Science: Exclusive Rights and Experimental Use" (1989) 56 U. Chi. L. Rev. 1017. Generally, see D. Vaver, "Intellectual Property Today: Of Myths and Paradoxes" (1990) 69 Can. Bar Rev. 98.

<sup>5</sup> H. Melville, *Moby-Dick or, the Whale*, L. Mansfield & H. Vincent, eds (New York: Hendricks House, 1952) [hereinafter *Moby-Dick*].

harpooned but gets away.<sup>6</sup> It is harpooned again by a second crew and taken. There is then a legal dispute, Whose fish is it? Melville cites a Dutch enactment of 1695. It is of apparently admirable brevity and states: "I. A Fast-Fish belongs to the party fast to it. II. A Loose-Fish is fair game for anybody who can soonest catch it."<sup>7</sup> But Melville then notes, "[W]hat plays the mischief with this masterly code [is that it needs a] vast volume of commentaries to expound it."<sup>8</sup> He then provides some wonderfully exotic examples: serfs, mortgages, and Ireland to John Bull are "fast-fish"; America before Columbus, ideas, and the Rights of Man are "loose-fish." As to the solution to the whale problem, the fish could be no one's property. Or, if one had to make a choice, the common law would give preference to possession, that is, to that person who had, or appeared to have, the fish fast alongside.<sup>9</sup>

Melville's insights suggest three dilemmas. First, society recognizes both whales and ideas. Lawyers, therefore, have to ascribe some consequences to that recognition, whether we like it or not. Second, the lawyer's problem with ideas is the practical one of whether a fish can be "both fast and loose, so to speak."<sup>10</sup> And that complication probably means that terse law would be no law. Any law on this subject will be difficult and probably complex. Third, and this really gets to the heart of the matter, there is the underlying tension between humanism and an economic vision of things. It was once said that Captain Ahab had become "a fast fish. The Universe has got its barb in him. His humanity is transfixed."<sup>11</sup> But as Melville himself wrote about Ralph Waldo Emerson: "Be his

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<sup>6</sup> *Ibid.* Melville's *Billy Budd* has also attracted the interest of academic lawyers. See C. Reich, "The Tragedy of Justice in Billy Budd" (1967) 56 Yale L. Rev. 369; W. Domnarski, "Law-Literature Criticism: Charting a Desirable Course with Billy Budd" (1984) 34 J. Leg. Ed. 702.

<sup>7</sup> *Moby-Dick*, *supra*, note 5 at 393.

<sup>8</sup> *Ibid.* at 393-94.

<sup>9</sup> I am indebted to C. Rose for reminding me of this chapter in *Moby Dick*. See C. Rose, "Possession as the Origin of Property" (1985) 52 U. Chi. L. Rev. 73 at 88.

<sup>10</sup> *Ibid.*

<sup>11</sup> W. Sedgwick, *Herman Melville: The Tragedy of Mind* (New York: Russell & Russell, 1962) at 120.

stuff begged, borrowed, or stolen or of his own domestic manufacture, he is an uncommon man ... The truth is that we are all sons, or nephews, or great nephews of those who go before us. No man is his own sire."<sup>12</sup>

In short, ideas are part of the seamless web of humanity. Breaking pieces out of that web, unless for an overwhelming justification, robs us of part of ourselves. Absent such a justification, we allow ourselves to be taken on the barb of commercial exploitation of ideas. This problem is particularly acute in an age which is increasingly commodifying the self and encouraging individuals to turn every aspect of their being into a reducible, divisible, saleable commodity. If merely to think of the idea of a play about the burning of Atlanta or how to present oneself as the latest pop fad (let alone  $e=mc^2$ ) is to be appropriable, the great chain of humanity is broken. At such a point, our humanity is truly "transfixed." It is with that ultimate concern in mind that I approach this subject-matter.

## II. THE BASIC PARADIGM

It is as well to begin with the fundamental principle. Perhaps the best known statement of it is found in a 1918 judgment of Justice Brandeis: "The general rule of law is that the noblest of human productions — knowledge, truths ascertained, conceptions and ideas — become, after voluntary communication to others, free as the air to common use."<sup>13</sup> The proposition as thus enunciated is complex. It has philosophical, economic, cultural, and political dimensions. All of these dimensions find practical expression in a legal bird cage mechanism.

Consider the case of Einstein. He is dubious about Newton's views on physics. He thinks — has the idea if you like — that the better truth is  $e=mc^2$ . He has not yet told the world or anybody so, although he has written out his formula with a few

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<sup>12</sup> Letter from H. Melville to E. Duyckink (3 March 1849). Reproduced in *Moby-Dick*, *supra*, note 5 at 569.

<sup>13</sup> *International News Service (INS) v. Associated Press*, 248 U.S. 215 (1918) at 250 [hereinafter *International News*].

explanatory notes. From the standpoint of the individual, the bird cage operates as a protection. Einstein cannot be forced to disclose his idea. The bird cage affirms his right to his innermost thoughts and ideas. In general, Einstein is under no duty to disclose. However, he may be in a position where he has voluntarily assumed a duty to disclose. He may be employed as a paid researcher, and he may have undertaken to commit his ideas to paper for his employers. And if he is on a university faculty, he will be bound by the scientific ethic which requires, even in the absence of a contract, a member of the academy to disseminate his ideas and research. The bird cage thus gives the individual the freedom to think and the right to assess the maturity of an idea before it is released.

From the standpoint of society, the position is more complex again. Einstein cannot be required to disclose his idea unless he has undertaken to do so in response to some ethical requirement or assumed obligation. But society offers no economic incentive to disclose. It may perhaps confer personal glory, or at least public acknowledgement, for whatever that means to Einstein. Society does not, however, confer an economic reward because it fears that Einstein may somehow get a monopoly on  $e=mc^2$  and whatever it might be applied to. Instead, the idea becomes part of the general heritage of humankind, and any person can make use of it in theoretical or applied modes. Indeed, more accurately stated, what Einstein has come up with is a scientific discovery. It would be anomalous to deprive the public of something it had always enjoyed, but had not theretofore recognised. However, society could, and does, reward the application of that discovery. Hence, rewarding Franklin for recognising the electrical nature of lightning goes too far; rewarding someone for creating a lightning rod does not.

The result of the bird cage mechanism for legal theory is as follows. Einstein can exercise a self-help remedy by not divulging what is in his mind. He can protect his idea in his private papers and if he tells somebody about it in confidence, though probably on conscience rather than proprietary grounds. But once the cage door is voluntarily opened, he has no proprietary rights in the idea. Public dedication has taken place. The dedicated idea is not appropriable by him nor by anybody else, although it ought to be attributed to him. Neither, it appears, can he rely on some kind of non-proprietary relational theory to follow his work. Just as



Einstein has no proprietary rights of paternity, he has no following rights. As an idea is applied and acquires further value, no compensation of an economic character is afforded him. He can, however, get a patent if he can think of a practical application of his idea. The text of his explanation, but not the underlying theorem, will then attract copyright.

In the overall result, the bird cage model avoids the zero sum trap. Both Einstein and society get some advantages and some disadvantages. A complex bargain is struck between a given individual and the rest of society. I have however probably said enough to indicate the very real intellectual and practical difficulties in this area of the law. What is an idea? What is the expression of it? Should we grant protection to intellectual creations, and if so, for how long and on what terms? And how do we turn our answers to those questions into workable legal formulas? The answers we give are a window both into our vision of society and the workings of the legal mind.

### III. THE EVOLUTION OF THE BASIC PARADIGM

It is useful to ask, How did this construct come into being? Something like this is rarely, if ever, created in a vacuum in the law. Holmes thought that the life of law lies in experience.<sup>14</sup> Events, not ideas, drive legal development. Others place a greater emphasis on the primacy of ideas.<sup>15</sup> The better answer may be that the life of the law lies in the way events and ideas interact to produce particular constructs.<sup>16</sup> In any event, Justice Brandeis's general proposition cannot be understood apart from the historical context and the ideas about legal ideas which swirled around those events.

The foundations of our present day intellectual property law came about in the transition from the seventeenth to the eighteenth

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<sup>14</sup> O.W. Holmes, *The Common Law*, M. Howe, ed. (Boston: Little, Brown & Company, 1963) at 5.

<sup>15</sup> H. Berman, *Law and Revolution* (Cambridge, Mass.: Harvard University Press, 1983).

<sup>16</sup> P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

century. The transition was one from a state in which an all-powerful monarchy granted economic favours for its own purposes to one which recognised more directly the rights of individuals. At the same time, the recognition came slowly and painfully that it would be necessary in the new order to balance private right and public need. Patents, the exclusive right to the fruits of a new manner of manufacture, came into being after judges struck down the huge privilege of Crown granted and enforced monopolies in trade. The judicial victory was endorsed by Parliament in the famous *Statute of Monopolies*.<sup>17</sup> And copyright, the right to replicate a work, eventually came to be vested in authors, not publishers. The system of rights turned itself end for end and then struggled into a precarious balance between public and private rights. The story of these developments is one of the most fascinating chapters in legal history, and its jurisprudential significance is routinely missed. I can here only sketch these developments.

We need to go back to England in the seventeenth and eighteenth centuries.<sup>18</sup> The printing press had been invented, and it was a time of flourishing literary endeavour. It was the age of Johnson, Pope, Sheridan, and Swift. But there was a heated debate, what Samuel Johnson called "the great question concerning Literary Property."<sup>19</sup> The problem was that the Crown had for many years strictly controlled printing. Only books registered with the Stationers Company could be printed, and only then within the guild. This amounted both to a form of censorship and a restrictive

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<sup>17</sup> *Statute of Monopolies* (U.K.), 21 Jac. 1, c. 3. See *Darcy v. Allin* (1602), Moo. K.B. 671, 74 E.R. 1131 (K.B.).

<sup>18</sup> I am particularly indebted for much of what follows in this section to J. Whicher, *The Creative Arts and the Judicial Process* (New York: Federal Legal Publications, 1965) c.5; B. Kaplan, *An Unhurried View of Copyright* (New York: Columbia University Press, 1967). See also L. Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968); F. Siebert, *Freedom of the Press in England 1476-1776* (Urbana: University of Illinois Press, 1952); J. Feather, "The History of Copyright and the Book Trade" (1988) 12 *European Intellectual Prop. Rev.* 377; S. Ricketson, *The Law of Intellectual Property* (Melbourne: Law Book, 1984) c.4; G. Hammond, "The Origins of the Equitable Duty of Confidence" (1979) 8 *Anglo-American L. Rev.* 71.

<sup>19</sup> J. Boswell, *Life of Johnson*, R.W. Chapman, ed. (London: Oxford University Press, 1970) at 310.

trade practice. It also deprived authors of whatever natural law rights they might have in their works.

Of course, it could not last. As early as Milton in 1644, authors began to assert that they must have some kinds of rights in their works.<sup>20</sup> They were becoming less dependent on patrons. And happily, creators displayed then the same contempt for legalism they have always displayed. The law was routinely disobeyed. Things like the probate inventories in England show that roughly one third of the books in England were not in fact enrolled and a flourishing black market and underground traffic existed in copyright. Lawyers actually conveyed what we would today describe as copyright interests regardless of the formal state of the law.

The licensing system eventually ended in 1694, thereby opening the way for two important new streams of legal development, the law of libel and the modern law of copyright. The Stationers petitioned Parliament upon the loss of the advantages of a restrictive trade practice. No longer having rights as publishers, they came up with the notion that *authors* should be protected and have copyright. This was not public spiritedness on their part. If copyright was a property right, it could then be assigned to the publishers, thereby giving them indirectly what they no longer had directly. Faced with pleading publishers and indignant authors, Parliament capitulated. In 1709, the famous *Statute of Anne* was enacted.<sup>21</sup>

This set the stage for some very difficult litigation. The statute did not expressly abrogate pre-existing common law rights, as contemporary Commonwealth copyright statutes now do.<sup>22</sup> Hence, these critical questions were raised: What, if any, common law rights did authors have in published or unpublished works prior to the *Statute of Anne*? And if there was a common law copyright, was

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<sup>20</sup> E. Sirluck, ed., *Complete Prose Works of John Milton*, vol. 1 (New Haven: Yale University Press, 1959) at 486. F. Mackinnon, "Notes on the History of English Copyright" in the *Oxford Companion to English Literature*, 3d ed. (London: Oxford University Press, 1946) 881 at 882 n. 3 credits Blackstone with the first published usage of the term "copyright."

<sup>21</sup> *Statute of Anne* (U.K.), 8 Anne, c. 19. Swift, Addison, and Steele took some part in the drafting. See *Donaldson v. Beckett* (1774), 2 Bro. P.C. 129, 1 E.R. 837 at 843.

<sup>22</sup> See, for instance, section 5 of the *Copyright Act 1962* (N.Z.). The same section preserves the jurisdiction with respect to breaches of confidence.

it perpetual? And perhaps most importantly of all, what legal effect did the passing of the *Statute of Anne* have on any pre-existing rights? The matter could not be resolved until after the twenty-eight year copyright period on a work had expired and somebody had allegedly pirated it. In the meantime, three things happened.

First, there was an ongoing debate amongst lawyers and intellectuals over the nature of copyright. On the one hand, the old licensing system had implied that, however imperfectly, authors had *something*. And to them, it seemed that natural justice, in Milton's terms, required that protection of some kind be given. On the other hand, the notion that an author could withhold work at that person's caprice did not seem right; still less did the idea that Shakespeare should have a perpetual copyright in his works.<sup>23</sup>

Second, some went to the Chancellors and obtained injunctions restraining the publication of unpublished manuscripts which had been surreptitiously purloined. These cases do not rest on the fully reasoned form of judgment we know today. The reports are brief and, in theoretical terms, can be explained either as the exercise of the Chancellors' conscience or the protection of a property interest, the only kind of interest protected by injunction.<sup>24</sup>

Third, a theoretician was now at work. William Blackstone, later Professor of Law at Oxford, was working towards the first systematic treatise on the laws of England.<sup>25</sup> He had to confront both the general nature of property and this difficult form of intangible property. He espoused a natural law theory of literary

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<sup>23</sup> See Whicher, *supra*, note 18 at 113. My edition of Boswell, *supra*, note 19 at 310 has Johnson in no doubt about the practice: "It has always been understood by *the trade*, that he, who buys the copy-right of a book from the author, obtains a perpetual property; and upon that belief, numberless bargains are made to transfer that property after the expiration of the statutory term."

<sup>24</sup> *Millar v. Taylor* (1769), 4 Burr. 2303, 98 E.R. 201 at 253 (K.B.) [hereinafter *Millar* cited to E.R.]. The cases include *Webb v. Rose* (1732), 4 Burr. 2330, 98 E.R. 216; *Pope v. Curl* (1741), 2 Atk. 342, 26 E.R. 608 (Ch.); *Duke of Queensbury v. Shebbeare* (1758), 2 Eden 329, 28 E.R. 924 (Ch.).

<sup>25</sup> See S. Milsom, "The Nature of Blackstone's Achievement" (1981) 1 Ox. J. Leg. Stud. 1; K. Vandeveld, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 Buffalo L. Rev. 325.

property, adopting the Lockean perspective that a man is entitled to the fruits of his labours. Therefore, an author should have the profits to be made from the commercial exploitation of his own creations. From the standpoint of authority, there were no decisions explicitly recognising authors' rights in their creations. But the old licensing acts and the equity decisions I have mentioned seemed to Blackstone to be based on the assumption that such common law rights existed. The *Statute of Anne*, as he read it, only gave additional remedies. Hence, when the statutory time limit had expired, the common law right would continue.<sup>26</sup>

Blackstone appears to be the first to suggest the idea of "public dedication" as a watershed. Where did he get this idea? A doctrine of dedication with respect to land had developed earlier in the century and Blackstone seems to have extended it by analogy.<sup>27</sup> But he complicated matters by classifying copyright in his taxonomy of property rights acquired "by occupancy," along with easements of light, air, and water. In doing so, he created a logical difficulty which he had overlooked. Rights of that kind were subject to a doctrine of abandonment by non-user.<sup>28</sup> It would follow that an author had rights only so long as the work was kept in print. If this was so, the common law right could not be "perpetual" as he argued.<sup>29</sup>

Blackstone had the support and encouragement of William Murray, later to become Lord Mansfield, Lord Chief Justice of the Court of King's Bench. Murray moved in literary circles and he was well aware that conveyancers had been treating copyrights as property rights in wills and attending to the sale of them before

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<sup>26</sup> W. Blackstone, *Commentaries on the Laws of England*, vol. 2 (Portland: Thomas B. Wait & Co., 1807) at 405-7.

<sup>27</sup> *Lade v. Shepherd* (1735), 2 Strange 1004, 93 E.R. 997 (K.B.); *Queen v. Inhabitants of Homsey* (1713), 10 Mod. 150, 88 E.R. 670 (K.B.).

<sup>28</sup> J. Kent, *Commentaries on American Law*, vol. 3, 12th ed. by O.W. Holmes, Jr. (Boston: Little, Brown, and Company, 1884) at 448 n. "o" and the English authorities there collected.

<sup>29</sup> Some Judges noted the point. See Ashton J. in *Millar*, *supra*, note 24 at 257; Gould J. in *Donaldson v. Beckett*, *supra*, note 21; *Cobbett's Parliamentary History of England*, vol. 17 (New York: AMS Press, 1966) at 984-85.

1700. As a barrister, he advised on some of these matters.<sup>30</sup> Murray thought that on this point practice spoke louder than words, and he was sure that the common law right existed in practice. And from a *moral* perspective, he thought there *ought* to be such a right. Hence, the decision in *Millar v. Taylor*<sup>31</sup> would have come as no surprise to Murray's contemporaries. In *Millar v. Taylor*, one of the few split decisions ever handed down by Lord Mansfield's court, it was held (3-1) that (1) the plaintiff owned the common law copyright in the work; (2) this right was not lost by publication; and (3) that the *Statute of Anne* did not abrogate that right.<sup>32</sup> *Millar v. Taylor* is a gold-mine of jurisprudential argument, as fine minds came to grips with the problem at the level of first principle.

Mr. Justice Yates delivered a powerful dissenting judgment. He insisted that there was no common law right in *published* works. His Honour saw things this way. I have an idea. Whilst I keep it to myself it is mine. But now I communicate the idea to you. It is now "our" idea. I cannot stop your mind from working on the idea or using it. Because I communicated it to you, I had no intention that it should be solely mine. The idea becomes the common property of me and you and, putatively, of all mankind. Nobody had or was suggesting that the English language could be *owned*. Since neither the ideas (when published) nor the words (published or unpublished) belong to me as an author, there was nothing I as an author could properly lay claim to in a published work under this statute. Thus, whether Parliament realised it or not, what it did was to create a right where none had existed in the *Statute of Anne*. And that right could be no longer than the statute prescribed.

Moreover, property was not absolute in the sense being contended for by Mr. Blackstone, who appeared as counsel. "All property has its proper limits,"<sup>33</sup> asserted the learned Judge. In the case of inventions (what we now call patents), it had already been determined that the inventor of the air pump had a property in the

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<sup>30</sup> See his judgment in *Millar*, *supra*, note 24 at 257.

<sup>31</sup> *Supra*, note 24.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* at 230.

machine, but not in the air, which was common to all. But notice the explanation for the grant. His Honour reasoned that "invention is the discovery of a vacant property, and the inventor then bestows cultivation upon it."<sup>34</sup> Thus did Mr. Justice Yates square himself with Locke's labour theory of property! And since he claimed property is "founded upon occupancy,"<sup>35</sup> this also reinforced his argument that nobody could own the idea.

The majority judges would have none of this. The *only* sense in which my ideas, having been communicated to you, can be said to be "ours" relates to the interrelated workings of your mind and mine. If I communicate my ideas to the public in a book, I have externalized those ideas. Any economic value then belongs to me. I may have given my *ideas* to the public, but I have not authorised anyone to make and market copies of my work.

But what is it that the author could actually protect? One possibility was only the identical work. The majority judges thought the net would have to be wider than that. Mr. Justice Willes said, "[Whilst] bona fide variations, translations, and abridgements are different [from copies]; and, in respect of the property, may be considered as new works ... colourable and fraudulent variations will not do."<sup>36</sup> But, of course, the seed of the problem was thus sown. Once one admits (as all the judges did) that ideas as such are not appropriable and (as the majority did) that the author owned *more than* the exclusive right to make and market *identical* copies of his work, the issue of ideas is never able to be set to one side. And Lord Mansfield could also see a related problem which has become of great contemporary relevance. In his *An Essay Concerning Human Understanding*, John Locke had suggested that "the Mind often exercises an active Power in the making ... several combinations. For it being once furnished with simple Ideas, it can put them together in several Compositions, and so make variety of complex Ideas, without examining whether they exist so together in

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* at 205.

Nature. And hence I think these ideas are called notions."<sup>37</sup> It was presumably this which Lord Mansfield had in mind when he said in *Millar v. Taylor* that copyright "is a property in notion."<sup>38</sup>

In the result, authors now had both the *Statute of Anne* and perpetual common law copyright. But the triumph was to be short-lived. The House of Lords several years later, in *Donaldson v. Beckett*,<sup>39</sup> overruled *Millar v. Taylor* by a margin of one vote. Lord Mansfield did not vote out of reasons of delicacy. There is great debate about that case and which of the eleven judges actually voted for what propositions. The various law reports are, at best, confusing and even contradictory. The casting vote was that of Lord Camden, a bitter political foe of Lord Mansfield. But subsequent judges have seen the decision as holding that the *Statute of Anne* pre-empted the common law right in published works.

The paradigm was thus set. Practically every intellectual property law case of any importance which has been decided since that time rehearses arguments which were traversed in this case, although it is rarely cited nowadays. Moreover, this legal paradigm mirrored changes in political philosophy and human behaviour. As Leo Braudy has pointed out, the Lockean tradition argued that you are your own property, and therefore only you can sell yourself.<sup>40</sup> It was on this premise that assertive human beings began to consider their minds and their careers as theirs to shape and sell. A road potentially leading to legal realisation of the "commodity self" had begun.<sup>41</sup>

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<sup>37</sup> J. Locke, *An Essay Concerning Human Understanding*, P. Nidditch, ed. (Oxford: Clarendon Press, 1975) Book II, c. 22, para. 2.

<sup>38</sup> *Millar*, *supra*, note 24 at 251.

<sup>39</sup> *Donaldson v. Beckett*, *supra*, note 21.

<sup>40</sup> L. Braudy, *The Frenzy of Renown: Fame and Its History* (New York: Oxford University Press, 1986) at 370.

<sup>41</sup> *Ibid.* at 371.



#### IV. THE EXTENT OF LEGAL PROTECTION OF IDEAS

Did this bird cage mechanism, as evolved, become a central plank elsewhere in the law? And has it been challenged? In considering these questions, we should be careful not to look for the obvious. Historically, lawyers have rarely assaulted citadels. They work obliquely, changing categories and creating chimera. Dramatic change cannot be lived with. And we should recall the inevitable problem that individual counsel and, at least, trial court judges are charged with looking downwards at individual cases. It is the direct task of scholars to try to see the big picture. I cannot, in a single article, demonstrate the position in detail in the entire body of our law. This has to be a sketch.

It is useful to imagine a horizontal line running from left to right. This line is labelled an "idea." There are various legal vehicles ranged along that line. Those which give the strongest legal protection for ideas are towards the left hand end of the line. The protection gets progressively weaker as we traverse right. I intend to pan a camera along that spectrum to get a sense of the overall situation.

##### A. *Patents*

Patents are the strongest form of intellectual property right known to our law. A patent is a state-supported monopoly. Even the creator who unknowingly creates the same invention at great expense can be restrained from marketing that invention by the holder of a valid patent. It is often said that a patent protects ideas. This is not really so, or at least the proposition requires careful clarification.

Take the case of Professor Morse. He conceived the electromagnetic telegraph. He could have sat on his idea and told no one of it. It would then have gone to his grave with him. No one would have inherited the idea, unless, like the Countess in Tchaikovsky's opera *The Queen of Spades*, it was posthumously

imparted to a young gambler in a dream.<sup>42</sup> Reliance on dreams does not advance us much. Professor Morse was more practical. He applied for a patent.<sup>43</sup> And he did what every practical person who applies for a patent does, he over-claimed. His largest claim was to "the exclusive right to every improvement where the motive power is the electric or galvanic current, and the result is the marking or printing of intelligible characters, signs, or letters at a distance."<sup>44</sup> This the court would not allow. Morse could not patent the discovery that electric current could be used this way. But his lesser claims, to the application of this knowledge, could stand. Patent law holds, depending on the jurisdiction, either as a matter of express statutory proscription or of judicial decisions, that patentable subject-matter must be new, not merely heretofore unknown. And there is a distinct time limit in patent statutes on the period for which the patent can be worked.

So what we have in patent law is a partial bird cage. The idea once released is to the patent office, which often trims the excess weight off the bird before releasing it, sheathed in relatively impregnable armour for a set period of time. The armour then self-destructs and the bird becomes fair game.

It might be thought that the discovery/application distinction would be difficult to apply in practice, but I do not think that has proved to be so. But it does lead to heartburn amongst scientists and engineers. The first to discover gets no reward; the first to invent does. *Should* we reach further back to the fundamental thinking stage? The objection to this was forcibly put by Justice Douglas:

Unless the ... claim ... has been reduced to production of a product shown to be useful, the metes and bounds of that monopoly are not capable of precise delineation. It may engross a vast, unknown and perhaps unknowable area. Such

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<sup>42</sup> I owe this reference to J. Phillips, *Introduction to Intellectual Property Law* (London: Butterworths, 1986) at 10.

<sup>43</sup> The facts are taken from *O'Reilly v. Morse*, 56 U.S. (15 How.) 62 (1854).

<sup>44</sup> *Ibid.* at 112.

a patent may confer power to block off whole areas of scientific development without compensating public benefit.<sup>45</sup>

## B. Property

The next strongest claim would be that an idea is recognised as a property right in and of itself, even without any statutory right. That has never been the law. But in recent years, there have been attempts in North America to say that information, and perhaps even ideas, are property for the purpose of general criminal law provisions.<sup>46</sup> For instance, in the United States, insider trading has been prosecuted under the general wire fraud provisions relating to transmission of information. More significantly, in Canada, a prosecution of a person under the general theft provision of the Canadian *Criminal Code*<sup>47</sup> for improperly reading information off a computer screen, without in any way interfering with the program or the computer, was upheld by the Ontario Court of Appeal.<sup>48</sup> It took an appeal to the Supreme Court of Canada to set the matter to rights.<sup>49</sup>

The problem here lies in a crudely instrumental approach to lawyering in response to concerns by both business and state interests about leaks and espionage with respect to sensitive information. Classifying this subject-matter as property is seen as a quick fix. If the prosecution in the Canadian case to which I have referred had ultimately succeeded, even if  $e=mc^2$  had been what was on the screen, it might well have been protected by the criminal law. Criminal law proscription is a dubious proposition in this

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<sup>45</sup> *Brewer v. Mason*, 383 U.S. 519 (1966) at 534.

<sup>46</sup> See G. Hammond, "Theft of Information" (1984) 100 L.Q. Rev. 252; "Theft of Information" (1988) 104 L.Q. Rev. 527; "The Misappropriation of Commercial Information in the Computer Age" (1986) 64 Can. Bar Rev. 342 [hereinafter *Misappropriation*]; "Electronic Crime in Canadian Courts" (1986) 6 Ox. J. Leg. Stud. 145; "R v. Stewart: The Final Judgment?" (1989) 11 Sup. Ct L. Rev. 421.

<sup>47</sup> *Criminal Code*, R.S.C. 1970, c. C-34.

<sup>48</sup> *R. v. Stewart* (1983), 42 O.R. (2d) 225, 74 C.P.R. (2d) 1.

<sup>49</sup> *R. v. Stewart*, [1988] 1 S.C.R. 963, 50 D.L.R. (4th) 1.

subject area. However, if it is undertaken, very careful delineation is required.<sup>50</sup>

### C. Copyright

Earlier in this essay, I left copyright at the point where it had evolved by statute into a very particular form of property right, and with the distinction between an idea and its expression drawn. The subsequent history of the distinction has not been entirely satisfactory. Some judges have avoided the issue and have been openly result-oriented. Lawsuits are determined on the basis of an *ad hoc* categorisation of the subject-matter as an idea or its expression. The reasons for the categorisation, then, have more to do with perceived general merits than intellectual integrity.

Other lawyers have taken the distinction very seriously indeed and have tried to find ways of giving it content. In 1930, Judge Learned Hand, one of the giants of intellectual property law, suggested an "abstractions" test:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in these series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.<sup>51</sup>

This test does not, however, tell the judge where to draw the line. It is only an analytical technique used in comparing the plaintiff's and the defendant's works. Professor Chafee, in 1945, thought that the protection covers the "pattern" of a work.<sup>52</sup> Subsequently, Professor Nimmer stood on the shoulders of both. He suggested that Judge Learned Hand's idea that a work can be broken into different levels of abstraction be combined with Professor Chafee's

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<sup>50</sup> In the *Crimes Bill 1989* (N.Z.), the proposed offence of taking a trade secret, clause 18, is very wide, as is the definition of "property" in clause 176.

<sup>51</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d. 119 at 121 (2d Cir. 1930).

<sup>52</sup> Z. Chafee, "Reflections on the Law of Copyright: I" (1945) 45 Colo. L. Rev. 503.

idea that substantial similarity can be determined by comparing common elements at a level that is still abstract, but still concrete enough to constitute an expression.<sup>53</sup> Professor Nimmer in fact undertook an exercise in which he compared *Romeo and Juliet* with *West Side Story*. He identified thirteen common elements and concluded that those common elements form a pattern sufficiently concrete to provide a basis for a finding that the two works are substantially similar. But the reach of the substantial similarity test can be gauged by the remark of the judge who recently said, "I would think there would be a substantial taking of *Gone with the Wind* if somebody just took the burning of Atlanta."<sup>54</sup>

This, in turn, suggests the second big contemporary problem with copyright law. There has been unremitting pressure by commercial interests to accommodate more ideas within the protective umbrella of copyright. The basic argument has been, if something looks alike, it is alike. Independent effort is discounted or discarded. Copyright then begins to look more like patent law, but without the safeguards of that body of law. I will give three illustrations here.

The first is the attempt to revive, in copyright law, Lord Mansfield's arguments about the protectability of a notion. An instance of such an attempt is *Green v. Broadcasting Corporation of New Zealand*.<sup>55</sup> Hughie Green, who evolved the essential features of the television show "Opportunity Knocks," complained that the Broadcasting Corporation had misappropriated certain ideas of his: some catch-phrases, the employment of sponsors, and the use of "clapometers" to measure studio audience reaction. These, he said, made up the central aggregation of ideas or format about the show.

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<sup>53</sup> M. Nimmer, *Nimmer on Copyright*, vol. 3 (New York: Matthew Bender, 1990) para. 13.03. The best overall discussion of the law in the United States relating to the protection of ideas is contained in chapter 16 of this volume. See also A. Christie, "Copyright Protection for Ideas: An Appraisal of the Traditional View" (1984) 10 Monash U.L. Rev. 175.

<sup>54</sup> *Roy Export Co. v. Columbia Broadcasting System*, 503 F. Supp. 1137 at 1145 (U.S. Dist. Ct. 1980), aff'd 672 F.2d. 1095 (2d Cir. 1982), cert. denied, 459 U.S. 826 (1982). The comment was made in the context of a suit involving a compilation of excerpts of Chaplin film clips for use at the Academy Awards. The burning of Atlanta may have occupied ten or fifteen minutes out of perhaps four hours in the original film. The legal point of principle is that the test for substantial infringement is qualitative, not quantitative.

<sup>55</sup> [1988] 2 N.Z.L.R. 490 (C.A.).

He said he had copyright in this aggregation. The Court of Appeal drew a distinction between a general idea or concept (which is not protected by copyright) and something delineated by or attended with detail, pattern, or incidents sufficiently substantial to attract copyright in the whole. This test was not met in this case, and Mr. Green's claim was dismissed. The Privy Council recently upheld that decision.<sup>56</sup> But notice what has happened. The door has been opened at least to *some* claims to ideas in copyright. We now have to grapple with two distinctions, namely between general ideas and other ideas, and between ideas and expression. The first distinction is apparently a question of degree. But the courts may well be offering us a contradiction in terms. If an idea is sufficiently developed, is it still an idea?<sup>57</sup>

My second illustration is the so-called indirect copying cases. In one New Zealand case,<sup>58</sup> the plaintiff successfully developed a tray for export of kiwifruit. The Kiwifruit Marketing Authority produced a standard specification based on that tray. The defendants, then, independently developed a tray of the same colour and similar form to the plaintiff's, using only the Authority's specification. Similarity came about because the industry specification was compulsory and inevitably took an independent designer to a very similar, if not identical, conclusion. But the Court of Appeal was not impressed. In principle, it said, a reproduction may result from indirect copying, even though such a holding patently gives protection to the central idea.<sup>59</sup>

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<sup>56</sup> [1989] 2 All E.R. 1056, [1989] 3 N.Z.L.R. 18 (P.C.).

<sup>57</sup> *Ibid.* See also *Wilson v. Broadcasting Corporation of New Zealand*, (1988) 12 I.P.R. 173 (N.Z.H.C.) in which a format claim in copyright succeeded; *Zeccola v. Universal City Studios*, (1982) 67 F.L.R. 225 (Aust. Fed. Ct.); *Hexagon Pty Ltd v. Australian Broadcasting Commission*, (1975) 7 A.L.R. 233 (S.C.); J. Stuckey-Clarke, "Remedies for the Misappropriation of Creative Ideas" (1989) 11:9 European Intellectual Prop. Rev. 333.

<sup>58</sup> *Frank M. Winstone (Merchants) Ltd v. Plix Products Ltd*, (1984) 3 I.P.R. 390 (H.C.).

<sup>59</sup> [1985] 1 N.Z.L.R. 376, 5 I.P.R. 156 (C.A.) Professor Jim Lahore took the same view of the case: "To give protection to a particular concept of functional design in this manner goes beyond the proper scope of copyright law. What was protected was essentially the plaintiff's idea for the system of eight counts which became standard for the industry." See "Copyright, Style, Ideas and Functional Design" (1985) 7:3 European Intellectual Prop. Rev. 83 at 86. But see also *British Leyland Motor Corporation v. Armstrong Patents Co. Ltd* [1986] 2 W.L.R. 400, 6 I.P.R. 102 (H.L.).

The third and the most difficult subject area involves computer software cases. It did not take all that long for courts and legislators to solve the first generation software issue. Both object code and source code were held to amount to a literary work or a translation or adaptation of it and, accordingly, to have copyright protection.<sup>60</sup> The second generation cases are concerned with screen representations. Software innovators have claimed that they have copyright protection in the screens, menus, and file structures that are an integral part of the *look and feel* of the particular programme. At base, the claim is to the intellectual structure and graphics (the ideas) which make up the external visual language of the programme.

Take the famous trash can in the Apple Macintosh graphics. If company A creates that image using programme X, does company B infringe by creating the identical image through a new programme Y? North American courts have been divided in these cases. Some have held that this conduct is copying.<sup>61</sup> At such a point, the birdcage is gone and Justice Brandeis's principle with it. Whether humanity would consider the Macintosh user-interface a *noble idea* might be debatable, but noble or not, it would belong to Apple and only Apple for fifty years.

Traditionally, courts have said they are looking for substantial similarity in copyright infringement cases. But, whereas originally

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<sup>60</sup> See, in New Zealand, *I.B.M. v. Computer Imports Ltd*, (1989) 14 I.P.R. 225, 2 N.Z.L.R. 395 (H.C.); B. Smith, "Copyright Protection of Computer Software" (1989) 6 Auckland U.L. Rev. 245; B. Brown, "Computer Software - Copyright Protection for Object Code in New Zealand" (1989) 11:9 European Intellectual Prop. Rev. 330.

<sup>61</sup> See *Whelan Associates v. Jaslow Dental Laboratory Inc.*, 797 F.2d 1222 (3d Cir. 1986), cert. denied, 107 S. Ct. 877 (1987); *Broderbund Software Inc. v. Unison World Inc.*, 648 F. Supp. 1127 (N.D. Cal. 1986); *Digital Communications Associates Inc. v. SoftKlone Distributing Corp.*, 659 F. Supp. 499 (N.D. Ga. 1987). The U.S. Copyright Office has not supported *SoftKlone*. See R. Stern, "The Copyright Office's Response to the *SoftKlone* Decision - Not Serendipitous" (1988) 10:9 European Intellectual Prop. Rev. 255 at 280. The law review literature is already voluminous. See, in particular, R. Stern, "The Centre Will Not Hold - Recent U.S. Developments in Protecting 'Idea' Aspects of Computer Software" (1987) 9:5 European Intellectual Prop. Rev. 125 [hereinafter *Recent U.S. Developments*]; D. Brinson, "Copyrighted Software: Separating The Protected Expression From Unprotected Ideas, A Starting Point" (1988) 29 B.C.L. Rev. 803; S. Englund, "Idea, Process, or Protected Expression?: Determining the Scope of Copyright Protection of the Structure of Computer Programs" (1990) 88 Mich. L. Rev. 866; K. Wiegner & J. Heins, "Giants Battle for Look and Feel Patents" *Business Review Weekly* (17 March 1989) 76.

they looked for similarity of form, today the focus is on similarity of result. It is what judges perceive as bad conduct by defendants, more than anything else, which gains judgments for plaintiffs. The danger of this approach is, of course, that of an appropriate yardstick for justice. Protection of form is measurable; conduct is infinitely debatable. And in the end, the copyright statute aims at a social, not an individual result.

#### D. *Contract*

The next strongest form of protection in law would lie in contract law, which confers substantial rights at least as between the parties to that contract. The law allows contract terms to restrict the disclosure of information, provided that disclosure is reasonable both as against the public and between the parties. At one time, violation of these principles led to the term being unenforceable. Now, under sensible law reform in some jurisdictions, a court can modify the term to something more reasonable in appropriate cases.<sup>62</sup>

But can the subject-matter of such a term be an idea or a fundamental concept such as  $e=mc^2$ ? In practice, clauses are drawn every day which purport to protect ideas, but there is little case-law authority on this point. In principle, there ought not to be an objection to the protection, perhaps even of an abstract idea, under such a clause. A contract creates no monopoly. It is effective only between the parties. It does not withdraw the idea from general circulation. Any party outside the contract is quite free to use it without restrictions. The encumbered party simply agrees not to do what they could otherwise do. And if the particular protection were ever thought to be too great, there is the obvious control vehicle that the protection must be reasonable as against the public. On the other hand, today in high technology industries, almost everybody is a specialist, and the orthodox body of law does not sit all that well with this new reality. Perhaps it is this which is causing

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<sup>62</sup> See *Illegal Contracts Act 1970* (N.Z.).



some judges, in more recent cases, to intuitively narrow the ambit of protected subject-matter.<sup>63</sup>

### E. Tort

Some jurisdictions recognise a tort of unfair competition.<sup>64</sup> Where such a tort is recognised, it rests on a view that, for both moral and economic reasons, unjustified free rider economic behaviour should be proscribed. In jurisdictions which do recognise such a tort, the problem of what subject-matter falls within it causes problems. In this area, it is possible that courts will end-run the copyright statute and create a right identical with Blackstone's conception of a common law copyright in published works. Certainly in New York, the centre of much of the literary and artistic life of the United States, precisely this has happened. There, the misappropriation doctrine of *International News*, in which Justice Brandeis articulated his principle, extends to all forms of commercially marketed literary and artistic property.<sup>65</sup> But at least the New York courts have seen the problem and restricted the protection to the author's expression, as opposed to mere ideas.<sup>66</sup>

Other jurisdictions have powerful new statutory torts which cover much of the ground which may once have been addressed by general concepts of unfair competition. For instance, in New Zealand, section 9 of the *Fair Trading Act 1986* (which mirrors Australian legislation) provides: "no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or

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<sup>63</sup> See, for example, *Faccenda Chicken Ltd v. Fowler* (1985), [1987] Ch. 117, [1986] 1 All E.R. 617 (C.A.).

<sup>64</sup> For Canada, see *Consumers Distributing Co. v. Seiko Time Canada Ltd*, [1984] 1 S.C.R. 583. The High Court of Australia delivered a crushing attack on the concept in *Moorgate Tobacco Co. v. Phillip Morris Ltd*, [1985] 59 A.L.J.R. 77. The issue has not been finally resolved in New Zealand.

<sup>65</sup> *Supra*, note 13.

<sup>66</sup> *Pocket Books v. Meyers*, 292 N.Y. 58, 54 N.E.2d 6 (Ct. App. 1944); *Archie Comic Pub. Inc. v. Am. News Co.*, 204 Misc. 1060, 125 N.Y.S.2d 919, aff'd, 129 N.Y.S.2d 915 (1954).

deceive."<sup>67</sup> This section has already generated a significant volume of litigation, and the principles under it are still evolving. For instance, whether a misrepresentation, and if so of what kind, is required before the section comes into play, is a matter of real importance. Another is that some judges have suggested that the section should not be read down by reference to the existing body of intellectual property law.<sup>68</sup> On such a view, this provision is like the famous fault provision in continental codes.<sup>69</sup> It stands naked and ready for an emperor's clothes. Before it is finally clothed, perhaps I could respectfully suggest that one undergarment might be Justice Brandeis's principle. Parliament surely did not intend, without a very specific and informed statement, to have displaced that entire body of learning from our law? It would be an unfortunate thing indeed if these new provisions were utilized to end-run one of the central planks of intellectual property law.

#### F. *Equity*

Prior to the evolution of copyright as we now know it, chancellors protected unpublished manuscripts, and subsequently all sorts of other confidences, in conscience. The governing principle today is said to be very broad: "[A person] who has received information in confidence shall not take unfair advantage of it."<sup>70</sup> The elements of the cause of action are that the information must

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<sup>67</sup> *Fair Trading Act 1986* (N.Z.).

<sup>68</sup> *Taylor Bros Ltd v. Taylors Group Ltd*, [1988] 2 N.Z.L.R. 1 at 27, McGechan J. (H.C.). The decision of the Court of Appeal is at [1988] 2 N.Z.L.R. 33. See also *Fair Trading Act 1986* (N.Z.), *supra*, note 67. See also *Dominion Rent A Car Ltd v. Budget Rent A Car Systems (1970) Ltd*, [1987] 2 N.Z.L.R. 395 (C.A.); *Taylor Bros Ltd v. Taylors Group Ltd*, [1990] 1 N.Z.L.R. 19 (C.A.); A. Brown & A. Grant, *The Law Of Intellectual Property in New Zealand* (Wellington, N.Z.: Butterworths, 1989) c. 7. In Australia, see *Parkdale Custom Built Furniture v. Puxu Pty Ltd*, [1982] 149 C.L.R. 141 (H.C.); W. Pengilly, "Section 52 of the Trade Practices Act: A Plaintiff's New Exocet?" (1987) 15 Aust. Bus. L. Rev. 247; P. Clarke, "The Hegemony of Misleading or Deceptive Conduct in Contract, Tort and Restitution" (1989) 5 Aust. Bar Rev. 109.

<sup>69</sup> See Art. 1053, *C.C.Q.*; Art. 1382, *C. Civ.* And see generally M. Bourgeois, "Protecting Business Confidences: A Comparative Study of French and Quebec Law" (1987) 3 I.P.J. 259.

<sup>70</sup> *Fraser v. Evans*, [1969] 1 All E.R. 8 at 11, Denning L.J. (C.A.).

not be publicly known; that it was imparted in circumstances giving rise to an obligation of confidence; and that there was an unauthorized use of the information, without just cause or excuse. The courts have not finally resolved whether detriment is an element, and if so, quite what that means.

Recently, in England, Australia, Canada, and New Zealand, claims have been made that "ideas" in Lord Mansfield's concept of "notions" are protected under this head of equity jurisdiction.<sup>71</sup> The idea or format for a television show (though well short of a script) has been protected. As one court put it:

The Court will prevent a person who has received an idea expressed in oral or written form from disclosing it for an unlimited period or until that idea becomes general public knowledge provided that (a) the circumstances in which it was communicated imported an obligation of confidence and (b) that the content of the idea is clearly identifiable, original, of potential commercial attractiveness, and capable of reaching fruition.<sup>72</sup>

And, going even further, one Canadian court has suggested that the unconsented-to use of an idea can amount to unjust enrichment. The idea in that case fell short of something of the stature of Milton's or Shakespeare's work. It was an idea for a lottery based on numbers to be printed in the weekend TV guide.<sup>73</sup>

What we have in these equity cases is judges creating a new control system for ideas outside copyright. They are doing so by saying that a notion or a format will be protected by the various relational causes of action in equity. This is not supplementary jurisprudence in the classical equity sense. This is equity leading the way, as it did in the eighteenth century. The critical conceptual

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<sup>71</sup> *Ibid.* *Talbot v. General Television Corporation Pty Ltd*, [1981] R.P.C. 1 (S.C. Vict.); *Promotive International Inc. v. Toronto Star Newspapers Ltd* (1985), 23 D.L.R. (4th) 196, 8 C.P.R. (3d) 546 (Ont. H.C.). The Law Commission and the Alberta Institute of Law Research and Reform proposed statutory schemes with respect to certain kinds of confidential information. See U.K., Law Commission, *Breach of Confidence* (Law Com.; no. 110) (London: H.M.S.O., 1985); Alberta Institute of Law Research and Reform, *Trade Secrets* (Report No. 46) (Edmonton: The Institute, University of Alberta, 1986). Others have opposed such regimes. See, for example, P.S. Atiyah, *Pragmatism and Theory in English Law* (London: Stevens & Sons, 1987) at 163-65.

<sup>72</sup> *Fraser v. Evans*, *supra*, note 70.

<sup>73</sup> *Promotive International Inc. v. Toronto Star*, *supra*, note 71.

features of this resurgent equity jurisprudence are the elements of "originality" and "concreteness." The element of originality needs further elaboration in the cases. If what is meant is merely that a plaintiff must show independent creation — that the idea was not copied from another — then that seems appropriate, if protection is to be granted. But if the requirement is more like that for novelty in a patent law sense, a much greater, and perhaps inappropriate, burden is raised. Concreteness raises the same difficulties as the copyright cases. And why in breach of confidence actions should commercial feasibility be required? Are we to take it that an action which amongst other things protects marital confidences has transmogrified into the equitable analogue of an economic tort? Indeed, is breach of confidence now equity's tort of unfair competition?

## V. HOW FAR HAS THE BASIC PARADIGM BEEN ERODED?

This essay has traversed over three hundred years of time and a good deal of law in those countries that follow the common law tradition. It may be useful at this point to summarise the position as I see it.

First, a caution. I have sketched the developments around the common law world. Not all of them are occurring simultaneously in every jurisdiction. It is dangerous to suggest a whole cloth out of pieces in different households. And, as always in the law, change is uneven, but discernible. That said, in the most general way, Justice Brandeis's principle still applies. But it is an open question whether the centre is truly holding. The fragile bird cage, under rough handling, may be falling apart. One distinguished American commentator has said in this context, "A rough beast (Blake would number him triple sixes) slouches towards birth, and a new Millennium spirals towards us in widening gyres."<sup>74</sup> What is

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<sup>74</sup> *Recent U.S. Developments*, *supra*, note 61 at 125. The allusion is to Yeats's "The Second Coming":

Turning and turning in the widening gyre  
The falcon cannot hear the falconer;  
Things fall apart, the centre cannot hold;  
Mere anarchy is loosed upon the world ...

driving this writhing mass of doctrine are the new technologies. These have produced fundamental socio-economic change. They have increasingly given rise to information-driven, service-based economies. Within such economies, information and ideas are increasingly commodified, as opposed to being treated as a resource.<sup>75</sup> The new technologies have also fed the apparently limitless appetite of humankind for entertainment. Information technology and entertainment are the two fastest growing economic sectors in the world. It is not surprising, therefore, that this is where the critical case-law developments are taking place.

There has to be real concern with the relational causes of action. Because these focus on perceived bad faith or bad conduct, they lend themselves, not by design, but in their effect, to end-runs around the intellectual property statutes. And in many ways, what the courts are doing is recreating under these causes of action the old eighteenth century concept of a common law copyright that Blackstone created, Lord Mansfield tried to establish, and Parliaments have said must not be. The effects of contract law are largely hidden, but the contract terms themselves grow ever more onerous. There is increasing utilisation of the criminal law to protect knowledge-based assets. Copyright is under pressure. First, because separating an idea from its expression is so difficult in relation to the new technologies. Second, because of the consistent pressure to enlarge the scope of the statute by judicial construction: "In the new Millennium, ideas are called expressions and are protected under copyright, which saves the owners of these new proprietary rights the inconvenience of dealing with the Patent office and of complying with its old-fashioned ways."<sup>76</sup> The Australasian

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See W.B. Yeats, *The Poems*, R. Finneran, ed. (New York: MacMillan Publishing, 1983) at 187. I had previously used the same allusion in *Misappropriation*, *supra*, note 46.

<sup>75</sup> See G. Hammond, "Quantum Physics, Econometric Models and Property Rights to Information" (1981) 27 McGill L.J. 47 [hereinafter *Quantum Physics*]; A.S. Weinrib, "Information and Property" (1988) 38 U.T.L.J. 117; D. Libling, "The Concept of Property: Property in Intangibles" (1978) 94 L.Q. Rev. 103; H. Dordick, *Information Technology and Economic Growth in New Zealand* (Wellington: Institute of Policy Studies, Victoria University Press, 1987).

<sup>76</sup> *Recent U.S. Developments*, *supra*, note 61 at 125.

fair trading act provisions<sup>77</sup> are a ready loose cannon and the current darling of the Australasian Bar. While there is no reason why lawyers should heed Melville's warning that terse law is no law — a lawyer does after all have the responsibility to advance every argument — it is apparent that the sections were poorly conceived and drafted. Judges have to decide particular cases, rather than dealing with system. Concern has been expressed in some appellate judgments at these developments, but that alone will not stem the growing tide of legal protectionism.<sup>78</sup>

## VI. THE WAY FORWARD?

Intellectual property is a difficult subject area. The courts cope as best they can at the micro-level of individual cases. They try to do justice as they see it, whilst paying some regard to the overall system. In this part, my concern is with the way forward at the macro-level. This is oppressively difficult. The dilemmas arise under a variety of heads. Those I propose to touch on here are social vision, theory, and political response. At the end of the day, whatever approach is settled on involves a consensus on the values and issues involved and a workable technocratic solution for the support of those values. Both ideals and technique must come together.

### A. *Social Vision*

I have suggested that the root cause of the problems I have been addressing is the now pervasive technological dimension of the human condition. This has two distinctive effects. First, it puts a premium on intellectual activities. Second, in various ways, it encourages individuals to atomize themselves and sell every facet of

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<sup>77</sup> For New Zealand, see *Fair Trading Act 1986*, *supra*, note 67. For Australia, see *Trade Practices Act 1974* (Aust.).

<sup>78</sup> See *C.B.S. Songs v. Amstrad*, [1988] 2 W.L.R. 1191 (H.L.); *Re The Coca-Cola Company*, (1986) 6 I.P.R. 275. See also V. Porter, "Copyright: The New Protectionism" (1989) 17 *Inter Media* 10.

their being.<sup>79</sup> This I have termed "the problem of the commodity self." How are we to respond to these phenomena?

Three giants of Canadian intellectual thought suggest a range of possibilities. First, there is the philosopher George Grant, whose stunning *Lament For A Nation* is a Scottish keen for the technological dependency of personkind.<sup>80</sup> Marshall McLuhan is at the other end of the spectrum of response, with a vision of technological determinism. As McLuhan saw it, the fact that technology exists in and of itself changes everything. We are not masters of our own destiny in the global village, and the sooner we get on with a technological utopia the better.<sup>81</sup> In between lies the political economist Harold Innis, who struggled to mediate humanism and technological dependency. His is a vision of attaining balance between the claims of culture (society) and empire (power).<sup>82</sup> These three thinkers are emblematic. They indicate that in terms of social theory the choice is between lament, utopia, and political struggle. Innis has to be closest to the world of realistic responses. Even if one accepted totally the theses of Grant and McLuhan, human dignity, if nothing else, would still require a struggle. We have to evolve a political response to the problem of technology and the proper protection of knowledge-based assets without damaging a central facet of our human heritage — the commonality of ideas. How is this to be done?

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<sup>79</sup> The same tendency can be seen in the recent decision in *Moore v. Regents of the University of California*, 202 Cal. Rptr. 494 (1988). It was held that a cell-line derived by researchers from a diseased spleen which had been surgically removed was the personal property of the plaintiff. See Braudy, *supra*, note 40 at 370-71.

<sup>80</sup> *Lament For A Nation* (Ottawa: Carleton University Press, 1982). See also G. Grant, *Time as History* (Toronto: Canadian Broadcasting Corporation, 1969); *Technology and Empire: Perspectives on North America* (Toronto: House of Anansi, 1969).

<sup>81</sup> *The Medium is the Message* (New York: Bantam Books, 1967); *Understanding Media: The Extensions of Man* (New York: McGraw Hill, 1964).

<sup>82</sup> *Empire and Communications* (Toronto: University of Toronto Press, 1972); *The Bias of Communications* (Toronto: University of Toronto Press, 1951).

## B. *Theory*

Part of the problem lies in the paucity of our thought, and might therefore logically be assisted by more and better theory. Our language and intellectual concepts are seriously deficient in the area of knowledge-based assets.<sup>83</sup> For instance, the concept of property has not evolved to meet the new realities. For Blackstone, property was physical and absolute. That was why he treated ideas like easements, and perpetual ones at that. Hohfeld dragged us into the twentieth century with his concept that property is simply a bundle of rights, albeit the largest rights of use and enjoyment the law will allow.<sup>84</sup> But neither property in the Hohfeldian sense, nor relational theories of obligations will do when, for instance, two different and independently created languages can simultaneously raise the same creation at the same instant, and both claim exclusivity. Finding a new theory of property, or some other way of viewing things, which will give new meaning in contemporary society will not be easy. And we should not beg the issue. It may not be just tort and contract that are, in the eyes of many, dying. Property as a legal paradigm may also be facing extinction. Much lawyering is a form of social technology, and our contemporary classifications and concepts are seriously outmoded for this kind of living problem.

## C. *Political Response*

If we must struggle for our answers, what might be the content and form of a response to the problem of the erosion of this paradigm? First, it may be that the thrust of the case-law developments outlined in this article are wrong, and the courts should forthrightly recognise this. The courts have largely assumed, without rigorous examination, that a case has been made out for

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<sup>83</sup> I made the same point a decade ago. See *Quantum Physics*, *supra*, note 75; R. Cotterell, "The Law of Property and Legal Theory" in W. Twining, ed., *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986) at 81.

<sup>84</sup> W. Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1923). See also R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).



incursions by them into the basic paradigm, at least in some areas of human endeavour. Some commentators have supported them.<sup>85</sup> Perhaps, a greater degree of scepticism is appropriate. The historic rationales of intellectual property law lay primarily in promoting science and the useful and performing arts. What mattered was a relationship between an "author" or an "inventor" and that person's "work." While those rationales have not entirely disappeared, the principle thrust of intellectual property law today is to protect investment in knowledge-based assets in the interests of economic growth and jobs. As noted, individuals have themselves embraced the new technologies in an unholy alliance. But I doubt if, even adopting an overtly economic rationale, the protection of formats for TV shows — though doubtless important to the industry and artistic persons within it — is a matter of such compelling economic moment as to warrant the sort of destruction of principle as is being suggested by the case-law developments. Neither are the problems of software producers. Merely reclassifying the particular commodity into an existing category of the law (as for instance "format" into "copyright") is an evasion. Neither is it a question of when a flavour becomes a poison. An important and enduring humanistic principle is being sacrificed to relatively short term economic ends.

Second, if I am wrong and these kinds of problems are thought to be of compelling concern, it would surely be better to limit incursion into the basic paradigm by enacting statutory provisions limiting that incursion to the particular subject-matter requiring protection. That is, any incursion should be formulated as a strictly construed exception to the basic paradigm.<sup>86</sup> Specific amendments or *sui generis* legislation, as with microchips, are far more preferable solutions.

Third, there is a strong case for substantial law reform. Resources and legislative time should be directed to the evolution of unified codes of technology, which will sweep up all the relevant statutory provisions and judicial *innovations*, refining, restating, and

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<sup>85</sup> See W. Cornish, "Confidence in Ideas" (1990) 1 I.P.J. Aust. 1.

<sup>86</sup> This approach is the one taken, as a matter of legal methodology, by the Canadian Supreme Court in *R. v. Stewart*, *supra*, note 49.

reforming them where necessary.<sup>87</sup> *Some* progress is being made in this general direction, but it is conservative and halting. The United Kingdom and Australia have recently introduced statutes which consolidate several formerly discrete areas of intellectual property law. But draftspersons and legislators have still not been prepared to move sufficiently far in the direction of fundamental reform and principled codes which will leave room for subsequent judicial application. One principle within such a code should be the nonappropriability of ideas. The arguments advanced by some commentators that legislators cannot act, or act too slowly because of unremitting pressure by multifarious interest groups, or that if they do act they will get it wrong, are no justification for the present judicial incursions.<sup>88</sup> Courts are, in the main, quite limited instruments of public policy articulation and application, and are at their best when boundaries have been mapped out. Judges need a ball park.

Fourth, within such a code, a great deal of attention needs to be paid to what might be termed demarcation problems. That in fact is where most of the technical problems are occurring today. As only one instance, when idea person X approaches company Y with a shiny new idea for a shiny new TV show, and assuming *some* kind of legal protection is thought to be appropriate, *should* X expect to be governed by the law of contract and to settle disclosure terms in advance of disclosure? Or should X be free to disclose, secure in the knowledge that something called "equity" or "breach of confidence" will come to the rescue if that person's idea is misappropriated? The failure to bring ideals and technique together leads not just to confusion and inefficiency. The real values at stake become obscured, or even set to one side, as lawyers play classification games for the private advantage of clients.<sup>89</sup> I am not

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<sup>87</sup> See also D. Davidson, "Common Law, Uncommon Software" (1986) 47 U. Pitt. L. Rev. 1037.

<sup>88</sup> I do not underestimate the difficulty of getting respectable legislation passed. For a review of the difficulties in the recent evolution of the U.S. copyright legislation, see J. Litman, "Copyright Legislation and Technological Change" (1989) 68 Or. L. Rev. 275. For an argument for judicial creation of intellectual property rights, see D. Rosen, "A Common Law for the Ages of Intellectual Property Law" (1984) 38 U. Miami L. Rev. 769.

<sup>89</sup> See J. Feinman, "The Jurisprudence of Classification" (1989) 41 Stan. L. Rev. 661.

sanguine that *that* phenomenon is about to disappear in the common law world, even assuming a shiny new code. But I do think a sounder, more publicly accessible law is distinctly achievable. The simple removal of the ability to play one or both ends against the middle would go some distance towards sustaining the paradigm, if we think it worth defending.

